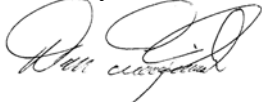


**TO:** Mayor Kelly and Members of Halifax Regional Council

**SUBMITTED BY:**

  
\_\_\_\_\_  
Dan English, Chief Administrative Officer

  
\_\_\_\_\_  
Wayne Anstey, Deputy Chief Administrative Officer - Operations

**DATE:** January 12, 2009

**SUBJECT:** **Case 01058 - Amendments to All Land Use By-laws: Temporary Construction Uses**

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### **SUPPLEMENTARY REPORT**

#### **ORIGIN**

- September 18, 2007, Regional Council passed a motion directing staff to undertake the process to amend all of HRM's Land Use By-laws regarding temporary construction uses.
- October 21, 2008, staff report outlines proposed amendments to all of HRM's Land Use By-laws regarding temporary construction uses
- December 9, 2008, Regional Council gave first reading to the proposed amendments.
- January 7, 2009 supplementary staff report providing clarification of proposed amendments
- January 9, 2008, Staff received a letter from Blair Mitchell, legal counsel for Trax Construction Limited.

#### **RECOMMENDATION**

It is recommended that Halifax Regional Council proceed with the holding of a public hearing on the proposed revised amendments to all HRM Land Use By-laws regarding "Temporary Construction Uses" as per staff's recommendation in the January 7, 2009 staff report.

#### **BACKGROUND / DISCUSSION**

Following Council's December 9, 2008 approval of first reading and the scheduling of the public hearing, staff have received a letter from Blair Mitchell of Mitchell & Ferguson, Associates requesting that Regional Council defer the public hearing on proposed amendments to all HRM Land Use By-laws regarding "Temporary Construction Uses" (Attachment A). The reason for the request is that they contend that staff did not comply with the public participation program approved by Council as outlined in the September 18, 2007 staff report (Attachment B).

Public Participation Program:

The September 18, 2007 staff report outlined the reasons for the amendments and the public participation program. The program adopted by Council is above and beyond the typical process utilized for amendments to land use by-laws. The program includes the following actions:

- 1. Meet with the Development Liaison Group (DLG) to discuss issues and opportunities, identify industry stakeholders and determine appropriate methods/forums for stakeholder input. Minutes recorded.**

Staff met with the DLG at its regular meeting on October 11, 2007 to discuss the matter of temporary construction uses and to seek input on defining relevant industry stakeholders, and the content of the consultation process. Previous to this meeting, staff also consulted with the DLG on the issue of temporary construction uses at its May 10, 2007 meeting.

- 2. Schedule consultation(s) with industry stakeholders, based on direction provided by the DLG. Minutes recorded.**

In response to comments received from the DLG, staff held a facilitated Industry Stakeholder consultation session on December 18, 2007. The comments received at the meetings were recorded and considered during the preparation of the proposed amendments.

- 3. Schedule minimum three (3) Public Information Meetings; one to be held in each administrative region of HRM (Eastern, Central, Western). Minutes recorded.**

Staff held three (3) Public Information Meetings as requested in each administrative region of HRM: Central (January 23, 2008), Western (January 30, 2008), and Eastern (February 6, 2008). The comments received at the meetings were recorded and considered during the preparation of the proposed amendments.

In addition to the three public meetings, staff also sent a memorandum to the Watershed Advisory Boards on February 20, 2008 to inform them of the issue and the process staff was following. In response, staff presented the issue to the Halifax/Halifax County Watershed Advisory Board on May 21, 2008 at their request. The comments received at the meetings were recorded and considered during the preparation of the proposed amendments.

#### **4. Staff report prepared, including proposed LUB amendments, and proceed to Regional Council for First Reading.**

Based upon the feedback received from the consultation program and staff's review of the issues and concerns with Temporary Construction uses, a staff report was prepared, including proposed Land Use By-law amendments, dated October 21, 2008.

On December 9, 2008 Regional Council discussed the report and held first reading which resulted in Council setting January 13, 2009 as the date for a public hearing. After First Reading was held, staff received additional comments from industry stakeholders requesting clarification of the proposed amendments which staff supported. In response, staff prepared a Supplementary Report, dated January 7, 2009, outlining the revised amendments to all Land Use By-laws.

#### **5. Public Hearing before Regional Council.**

Public Hearing set for January 13, 2009.

#### **Evaluation of Staff Action**

Staff have reviewed the public participation program and its actions with Legal Services. Upon review of staff's actions, Legal Services has determined that staff have complied with the approved public participation program and Regional Council should proceed with the duly advertised public hearing on the proposed amendments as contained in the January 7, 2009 staff report.

#### **BUDGET IMPLICATIONS**

The costs to process this planing application can be accommodated within the approved operating budget for C310.

#### **FINANCIAL MANAGEMENT POLICIES / BUSINESS PLAN**

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Capital and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Capital and Operating reserves, as well as any relevant legislation.

#### **ALTERNATIVES**

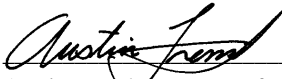
1. Council may choose to proceed with the public hearing. This is staff's recommended course of action.
2. Council may choose to not proceed with the public hearing. This will require re-advertising for a public hearing.

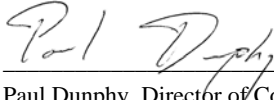
**ATTACHMENTS**

Attachment A                      Letter from Blair Mitchell of Mitchell & Ferguson, Associates  
Attachment B                      Public Participation Program (From the Sept. 18, 2007 Staff Report)

A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.html> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

Report Prepared by:                      David Lane, Senior Planner, 490-5719

Report Approved by:                        
Austin French, Manager of Planning Services, 490-6717

Report Approved by:                        
Paul Dunphy, Director of Community Development

MITCHELL & FERGUSON, ASSOCIATES

Barristers, Solicitors and Notaries Public

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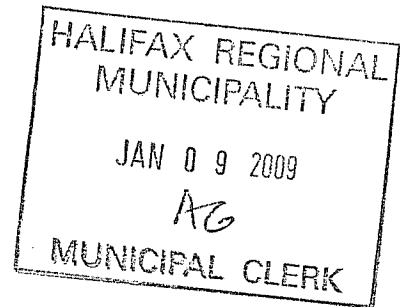
FILE REFERENCE: 2834-17

**URGENT**  
**WITHOUT PREJUDICE**

January 9, 2009

VIA FAX 490-4208

Julia Horncastle  
Acting Clerk of the Municipal Council  
City Hall  
1841 Argyle Street, Main Floor  
PO Box 1749  
Halifax, NS B3J 3A5



VIA FAX 490-4232

Mary Ellen Donovan  
Halifax Regional Municipality Legal Services  
5251 Duke Street, 3rd Fl, Duke Tower  
PO Box 1749  
Halifax, NS B3J 3A5

Dear Madam Clerk and Ms. Donovan:

**Regional Council – January 13, 2009-01-09**  
**Case 01058 - Amendments to All Land Use By-laws: Temporary Construction Uses**

We represent Trax Construction Limited of Halifax.

This letter concerns the proposed presentation to Regional Council scheduled for January 13, 2009, of the proposed report and draft By-Law amendments entitled "Temporary Construction Uses" under Case 010508.

Please accept this correspondence as a demand that consideration of this agenda item be postponed and deferred pending the Municipality's compliance with the extent and terms of the consultation process which it undertook at law and which it, itself, prescribed on September 17, 2007. These standards have not been complied with by HRM.

Any premature consideration of the report and the proposed By-law it advances, will violate the Municipality's duty to comply with reasonable and legitimate expectations of the opportunity to be heard and to be consulted (in addition to those processes normally statutorily and publicly available) within the sector. HRM created such expectations when it established the review process sixteen months ago, on

*Preferred Areas of Practice*  
*Civil Litigation and Administrative (Regulatory) Law including Employment Law*



September 17, 2008. Such a premature presentation of the report to HRM Council, specifically without the opportunity for further, close stakeholder and sector response to the report, to the pre-conceptions which underlie it and without the sectoral opportunity to address terms of the By-Law, will directly contravene the express terms of the public consultation prescribed for it by the resolution of Halifax Regional Council at the inception of the review.

We therefore consider and advise:

1. that the Municipality, in our view, is estopped from considering these changes pending review in accordance with, and meeting the standards of consultation it undertook at that time;
2. that further legislative process in the absence of having complied with those standards will expose the adoption of such a report or the introduction of such a By-law – regardless of subsequent process – to the judicial conclusion that it is of no legal force or effect.

Moreover, the practical result of this premature presentation of the report is that it risks not only the adoption of, at best, questionable public policy, but it is directly at odds with the adoption of a comprehensive on-site uses policy.

### **Trax Construction Limited**

Trax has been a leader in efforts to see the adoption of environmentally appropriate and energy conserving development practices within HRM. Trax's efforts in the field have been award-winning and our client has worked closely with the professional, university and intellectual communities, in developing such an approach. Its efforts are well and widely recognized.

### **Background**

On September 17, 2007, Halifax Regional Council instructed Municipal staff members "to undertake the process to amend all of HRM's Land Use By-Laws regarding temporary construction uses." The process, as directed by the Council, was to require a comprehensive review of existing By-Laws from a range of policy perspectives, not the least of which was to be the adoption of environmentally appropriate construction practices in land development within the Municipality.

The content and standard of the existing By-Law has deep environmental, energy-saving and business public policy implications that are fundamental to the land development process in the Municipality. Its amendment and adoption in amended form – whatever the By-Law's content might be – will have fundamental implications for development practices in the Municipality.

It was apparent at the time that the proposed review would engage significant, long term development, environmental and land development financial commercial interests, requiring a specifically designed review and consultation and By-Law development process. Council, on the recommendation of staff, treated the matter as a new and significant development in municipal policy.

It has been, no doubt, for these reasons, that Council adopted a specialized, pre-report consultation process to precede the reading of the By-Law and in addition to the process already prescribed and generally available for its consideration and ultimate adoption.

Council called for, among other things, a broad based sectoral and public review of all aspects of on-site temporary construction uses, including crushing of on-site product, screening, chipping and preparation of wood chip and related site-produced construction materials, in advance of the presentation of a report and proposed By-Law to Council.

This process was considered and treated as warranting a carefully designed and individually conducted review process, which demanded specialized opportunities for input and advice to Municipal staff which, in itself, acknowledged that the ordinary By-Law approval process alone would be insufficient to ensure a consultation process competent to meet the standards of review necessary to the importance of the By-Law and its implications.

Council's resolution instructed staff to follow a process to be outlined by the Municipality's Design Liaison Group ("DLG") which was to include, on a minutes-recorded basis, the identification of industry stakeholders and to determine appropriate methods/forums for stakeholder input.

The importance of ongoing effective liaison of this process with the DLG itself, and with the stakeholders in the field, through timely, comprehensive processes involving groups with particular interest and expertise in the field, emphasizes both the significance of the review and Council's conclusion that a special, consultative process, in addition to conclusion that available under the ordinary process of HRM, was central to the policy issues at play.

The review process has failed to meet these fundamentals of its own requirements, to the detriment and loss of the public, the development community and the Municipality as a whole, as follows:

1. The process, did not, at any stage meet or incorporate the expectation of the community that consultations with members of the stakeholder community would be of a nature and quality allowing for ongoing policy development dialogue between the stakeholders and the staff members preparing the ultimate report to Council, not only on the initial input they were entitled to make, but also through the ongoing opportunity of exchanging ideas and concerns on the material to be presented to Council, including the proposed form of By-law.
2. The process would link the foregoing, *in a timely way*, between practices and circumstances as they existed as the process began, to those in existence at the time that recommendation was to be made to Council;

Neither of these events have yet occurred. Specifically:

1. There has been no authorized consultation – with anyone, to the knowledge of Trax – since February, 2008, long before the current terms of the draft By-Law were resolved;
2. There has been no authorized consultation – with anyone, to the knowledge of Trax – concerning the abandonment of an entire range of activities related to construction from the

proposed By-law, providing , and regulating, the on-site screening of site materials and wood chipping directly in contravention of the original investigation directed by Council;

3. There has been no opportunity to consult whatsoever extended to stakeholder groups or otherwise within the sector, in the review of these draft By-laws, as originally directed by Council, to ensure that the work product in the form of these By-Law Amendments reflects the benefit of appropriate consultations in advance of the ordinary public hearing process.

Publicly, from the date of the last Public Information Meeting, February 6, 2008, when the matter was said to be fixed for return to Council in some two to three months time, to date, there has been no further public consultation and no further stakeholder consultation of any kind. Indeed, stakeholders, including our client, together with other members of the community, were never notified of the preparation of this report, inclusive of By-law amendments notwithstanding its apparent preparation as long ago as October, 2008.

From that date, through to December 16, 2008, *after* the matter had been presented to Council committee of the whole on the same date, there has been no further contact with stakeholder groups, no public discussion, no further public information sessions and most importantly, no sector discussions on the current form of recommendation.

Both the scope of the review and its subject-matter were fixed by the Council of this Municipality. Unilateral activities-- including ignoring long standing precedents and practices and including ignoring the inter-relationship of all construction activities in favour of isolating one -- cannot be permitted to override either that procedural direction, of the substantive policy merits conceived by Council when this review was ordered.

### Conclusion

We demand that the Municipality immediately withdraw the subject of the proposed report and By-law from the agenda of Council for January 13, 2009, immediately implement a further sectoral consultation process in accordance with its September 17, 2007 directive to staff, and suspend further consideration of the matter pending a report reflecting the benefit of such a consultation. The Municipality is further advised that we see each of the circumstances of this failure to consult, the failure to give reasonable notice of the intention to proceed to this stage independently of prior direction and the proposal of a report and By-law amendments in this way as arbitrary, discriminatory, unreasonable and, with respect, actionable.

Failing this, we regret to advise that we see no alternative but to recommend that our client commence forthwith the appropriate legal action.

Yours very truly,  
Mitchell & Ferguson, Associates



Blair Mitchell

BM/ab



**Attachment B**  
**Public Participation Program (From the Sept. 18, 2007 Staff Report)**

**Proposed Public Participation Program:**  
**Region-wide LUB Amendments Respecting Temporary Construction Activities**

1. Meet with the Development Liaison Group (DLG) to discuss issues and opportunities, identify industry stakeholders and determine appropriate methods/forums for stakeholder input. Minutes recorded.
2. Schedule consultation(s) with industry stakeholders, based on direction provided by the DLG. Minutes recorded.
3. Schedule minimum three (3) Public Information Meetings; one to be held in each administrative region of HRM (Eastern, Central, Western). Minutes recorded.
4. Staff report prepared, including proposed LUB amendments, and proceed to Regional Council for First Reading.
5. Public Hearing before Regional Council.